

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

02 Cr. 1185 (RPP)

- against -

OPINION AND ORDER

HENRY BOONE,

Defendant.

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ROBERT P. PATTERSON, JR., U.S.D.J.

On March 23, 2009 this Court entered an Order requesting counsel for the parties to advise the Court whether the Amended Judgment entered January 30, 2009 should be amended further. The government responded by letter dated April 3, 2009 and Defense responded by letter dated April 24, 2009.

Both parties agree that the Judgment dated January 30, 2009 contains clerical errors and needs correction. The Government also contends however that the Amended Judgment should not reflect the Circuit Court's opinion in United States v. Whitley, 529 F.3d 150 (2d Cir. June 26, 2008), since Defendant did not file a petition requesting that relief. Defendant's counsel maintains that a modification in the light of Whitley was appropriate when made in conjunction with the Court's modification of the Defendant's sentence on November 29, 2008 to reflect the U.S. Sentencing Commission's retroactive adjustment of the guidelines for crack cocaine.

In its November 21, 2008 Opinion and Order, the Court reduced Defendant's sentence on Count One to 140 months and then stated that his sentence on all other counts of the Indictment would remain unchanged. At that time, the Court was unaware

that previously U.S. v. Whitley had been decided by the Second Circuit on June 16, 2008 and an Order denying rehearing was filed on October 8, 2008. However, at the time of entering the November 21, 2008 decision, the law in the Second Circuit was clear that the mandatory sentence of five years on Count Two of the Indictment should run concurrently not consecutively to any longer mandatory minimum sentence on another count. The January 30, 2009 Judgment was intended to correct this error of law of the Court on November 21, 2008. Accordingly, the Court will correct the clerical errors in the January 30, 2009 Amended Judgment entered February 2, 2009 to read as follows:

Count One: (possession with intent to distribute crack cocaine) 140 months of imprisonment to run concurrently with Counts Four and Five.

Count Two: (possessing a firearm in furtherance of a drug trafficking crime) mandatory five years of imprisonment to run concurrently with Counts One, Three, Four and Five.

Count Three: (possessing a firearm with a defaced serial number) mandatory five years of imprisonment to run concurrently with Counts One, Two, Four and Five.

Count Four: (felon in possession of a firearm) mandatory fifteen years of imprisonment to run concurrently with Counts One, Two, Three and Five.


Count Five: (felon in possession of ammunition) mandatory fifteen years of imprisonment to run concurrently with Counts One, Two, Three and Four.

The basis of change in the judgment entered is that at the time the amended sentence was imposed in November 2008, it had been determined by the Second Circuit in United States v. Whitley, 529 F.3d 150 (2d Cir. 2008), rehearing denied, 540 F.3d 84 (2d Cir. 2008) that as a matter of law, the mandatory five year term required for Count Two must run concurrently with the mandatory terms of fifteen years required for Counts Four and Five.

Accordingly, for the Court in November 2008 to reimpose the consecutive sentence would be plain error. See e.g., United States v. Henriquez, 2009 U.S. App. Lexis 11447, *2-3 (2d Cir. 2009). United States v. Williams, 558 F.2d 166 (2d Cir. 2009).

IT IS SO ORDERED.

Dated: New York, New York
August 6, 2009


Robert P. Patterson, Jr.
U.S.D.J.

Copies of this Opinion and Order sent to:

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